| | |
|---|---|
| CITATION: | *R v O'Brien* [2017] NTSC 34 |
| PARTIES: | THE QUEEN |
| | v |
| | O'BRIEN, Clifford John Peter |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION |
| FILE NO: | 21611734<br>21611715 |
| DELIVERED: | 19 May 2017 |
| HEARING DATE: | 26 April 2017 |
| JUDGMENT OF: | GRANT CJ |

**CATCHWORDS:**

CRIMINAL LAW – OFFENCES AGAINST THE PERSON – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – SIMILAR FACTS – TENDENCY EVIDENCE

Evidence of conduct on the part of the accused which would establish a sexual interest in adolescent boys and a preparedness to act on that interest – must satisfy the requirements of ss 97 and 101 of the *Evidence (National Uniform Legislation) Act* 2011 (NT) ("ENULA") – could evidence rationally affect to a significant degree the assessment of the probability of a fact in issue – if so, does the probative value of that evidence substantially outweigh any prejudicial effect it may have on the accused – the evidence had significant probative value within the meaning of s 97 of the ENULA –

the risk that the jury may use the evidence improperly accommodated by suitable directions – evidence in relation to conduct involving adolescent boys admissible for tendency purposes – evidence in relation to conduct involving young children and adults inadmissible for tendency purposes.

CRIMINAL LAW – OFFENCES AGAINST THE PERSON – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – RELATIONSHIP EVIDENCE

Whether context or relationship evidence admissible – in order for context or relationship evidence to be relevant it must be shown that the evidence would make the complainant's version of the particular incident subject to the charge more capable of belief when seen in the context of that relationship –without the evidence the jury would be called upon to decide the case without an understanding of the progression of the relationship – the probative value of the evidence not outweighed by the danger of unfair prejudice to the accused – any unfair prejudice to the accused may be ameliorated by appropriate directions to the jury – evidence admissible as relationship or context evidence.

CRIMINAL LAW – OFFENCES AGAINST THE PERSON – JURISDICTION, PRACTICE AND PROCEDURE – INFORMATION, INDICTMENT OR PRESENTMENT

Application to sever indictment – offences form part of "a series of offences of the same or a similar character" – evidence cross-admissible between counts – potential prejudice may be addressed by an orthodox direction to the jury – application dismissed.

*Criminal Code* (NT) ss 1, 181, 186, 309, 341, 341A
*Evidence (National Uniform Legislation) Act* 2011 (NT) ss 55, 95, 97, 101, 135, 137

*Ainsworth v Burden* [2005] NSWCA 174, *BC v R* [2015] NSWCCA 327, *BD v The Queen* [2017] NTCCA 2, *CEG v The Queen* [2012] VSCA 55, *Conway v R* (2000) 172 ALR 185, *De Jesus v The Queen* (1986) 61 ALJR 1, *Doklu v R* (2010) 208 A Crim R 333, *DPP v Boardman* [1975] AC 421, *DSJ v Director of Public Prosecutions (Cth)* (2012) 215 A Crim R 349, *Dupas v The Queen* (2010) 241 CLR 237, *FDP v R* [2008] NSWCCA 317, *GBF v The Queen* [2010] VSCA 135, *Gilbert v The Queen* (2000) 201 CLR 414, *Gonzales v R* (2007) 178 A Crim R 232, *Hoch v The Queen* (1988) 165 CLR 292, *HML v The Queen* (2008) 235 CLR 334, *IMM v The Queen*

(2016) 257 CLR 300, *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 180 ALR 569, *Packett v The King* (1937) 58 CLR 190, *Papakosmas v The Queen* (1999) 196 CLR 297, *R v AH* (1997) 42 NSWLR 702, *R v BD* (1997) 94 A Crim R 131, *R v Cornwell* (2003) 57 NSWLR 82, *R v Ford* (2009) 201 A Crim R 451, *R v Grant* [2016] NTSC 54, *R v Johnston* [2016] NTSC 57, *R v Liddy* (2002) 84 SASR 231 19, *R v Lisoff* [1999] NSWCCA 364, *R v Lock* (1997) 91 A Crim R 356, *R v Lockyer* (1996) 89 A Crim R 457, *R v Mokbel* (2009) 26 VR 618, *R v Papamitrou* (2004) 7 VR 375, *R v PJMS* [2011] NTSC 48, *R v Quach* (2002) 137 A Crim R 345, *R v Suteski* (2002) 56 NSWLR 182, *R v TJB* [1998] 4 VR 621, *R v Watkins* (2005) 153 A Crim R 434, *R v Zhang* (2005) 227 ALR 311 , *Reza v Summerhill Orchards Ltd* (2013) 37 VR 204 *Sutton v The Queen* (1984) 152 CLR 528, *The Queen v JRW* [2014] NTSC 52, considered.

A Cossins, Alternative Models for Prosecuting Child Sex Offences in Australia (2010), prepared for the National Child Sexual Assault Reform Committee, 181; cited in *Family Violence – A National Legal Response* (ALRC Report 114).
S Odgers, *Uniform Evidence Law*, Thompson Law Book Co, Looseleaf Service.

**REPRESENTATION:**

*Counsel:*

| | |
|---|---|
| Plaintiff: | R Micairan |
| Defendant: | T Collins |

*Solicitors:*

| | |
|---|---|
| Plaintiff: | Director of Public Prosecutions |
| Defendant: | Central Australian Aboriginal Legal Aid Service |

| | |
|---|---|
| Judgment category classification: | B |
| Judgment ID Number: | GRA1703 |
| Number of pages: | 36 |

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

*The Queen v O'Brien* [2017] NTSC 34
No. 21611734
No. 21611715

BETWEEN:

**THE QUEEN**
Plaintiff

AND:

**CLIFFORD JOHN PETER O'BRIEN**
Defendant

CORAM: GRANT CJ

REASONS FOR DECISION

(Delivered 19 May 2017)

[1] There are two preliminary issues arising for determination in advance of the trial of this matter. The first issue is an application by the accused for counts 1 to 10 concerning the first complainant to be severed and tried separately from the counts concerning the second complainant; and for counts 11 to 16 concerning the second complainant to be severed and tried separately from counts 17 and 18 concerning the second complainant. The second issue is an objection by the accused to the admissibility of evidence which the Crown has given notice of its intention to adduce for tendency purposes.

**The indictment**

[2] The accused is charged on the one indictment dated 29 March 2017 with 10 counts of sexual offending against the first complainant over the period between 1 January 1978 and 31 December 1981, and eight counts of sexual offending against the second complainant over the period between 1 January 1983 and 31 December 1992.

**The relationship between severance and tendency evidence**

[3] In its severance application the defence seeks the exercise of the discretion pursuant to s 341 of the *Criminal Code* (NT), which provides:

> **Separate trials where 2 or more charges against the same person**
>
> (1) Where before a trial or at any time during a trial the court is of opinion that the accused person may be prejudiced or embarrassed in his defence by reason of his being charged with more than one offence in the same indictment or that for any other reason it is desirable to direct that the person should be tried separately for any offence or offences charged in an indictment the court may order a separate trial of any count or counts in the indictment.
>
> (1A) Subsection (1) applies subject to section 341A.

[4] Section 341A of the *Criminal Code* was inserted in 2014 to provide:

> **Presumption of joint trial of sexual offences**
>
> (1) Despite any rule of law to the contrary, if an accused person is charged with more than one sexual offence in the same indictment, it is presumed that the charges are to be tried together.
>
> (2) The presumption is not rebutted merely because:
>
> (a) evidence on one charge is not admissible on another charge; or

(b) there is a possibility that evidence may be the result of collusion or suggestion.

[5] Well before the introduction of statutory presumptions in favour of the joinder of counts in sexual offence cases, there had been a substantial alteration to the common law by which charges could be joined in the same indictment if they formed part of "a series of offences of the same or a similar character".[1] That alteration was adopted in s 309 of the *Criminal Code*, which provides:

> **Circumstances in which more than one charge may be joined against the one person**
>
> (1) Charges for more than one offence may be joined in the same indictment against the same person, whether he is being proceeded against separately or with another or others, if those charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose.
>
> (1A) To avoid doubt, charges for more than one offence may be joined in the same indictment even if the offences are alleged to have been committed against different persons.
>
> (2) Charges of stealing any property or, alternatively, of receiving the same property knowing or believing it to have been stolen may be joined in the same indictment.

[6] The meaning of the word "series" in that context has been said to be somewhat vague, but connotes some connection between the crimes[2]; relates more to the legal character or components of the offences than to the facts alleged by the prosecution in each particular instance[3]; and

---

**1** First introduced in England by the *Indictments Act*, 1915, Schedule I, rule 3.

**2** *Packett v The King* (1937) 58 CLR 190 at 207; *Sutton v The Queen* (1984) 152 CLR 528 at 540-541.

**3** *De Jesus v The Queen* (1986) 61 ALJR 1 at 9.

requires some nexus or similarity between the offences which in all the circumstances of the case enables them to be described as a series.[4]

[7] The courts retained discretion to order severance in appropriate cases, and in the exercise of that discretion sexual offences were treated with particular care because they were peculiarly likely to arouse prejudice.[5] Sexual offences against multiple complainants were also considered to carry some elevated risk of concoction on the basis of "common sense and experience".[6] They were generally considered to form a special class of offence which should be tried separately except where the evidence on one count was admissible on another count.[7] Where the evidence of one offence was not admissible towards proof of guilt on the other offence, severance would ordinarily be necessary to protect the accused person against the risk of impermissible prejudice.[8]

[8] However, where evidence of the commission of one offence was admissible as "similar fact" evidence in proof of the commission of another offence, there was nothing to be gained by directing separate trials because the same evidence would be admissible in each trial.[9] Even where the evidence on the different counts was cross-admissible,

---

**4** *R v PJMS* [2011] NTSC 48 at [10].

**5** *De Jesus v The Queen* (1986) 61 ALJR 1 at 3.

**6** *Hoch v The Queen* (1988) 165 CLR 292 at 297

**7** *De Jesus v The Queen* (1986) 61 ALJR 1 at 10; *R v Liddy* (2002) 84 SASR 231.

**8** *Sutton v The Queen* (1984) 152 CLR 528 at 542.

**9** *De Jesus v The Queen* (1986) 61 ALJR 1 at 10.

however, severance would be ordered if a joint trial would give rise to some relevant and incurable prejudice.

[9] The presumption in favour of joint trials in sexual offence cases was first introduced in Victoria in 1997 in terms similar to s 341A of the *Criminal Code*. The movement away from the common law predisposition to separate trials in cases concerning sexual offences against two or more complainants is reflective of the modern policy approach in which separate trials are seen to create the very real possibility of an artificial individualised context. In cases concerning sexual offences of the same or similar character, separate trials permit a defendant to conduct his or her defence in each trial in isolation from the other charges, and, in the absence of corroborating evidence from other victims, to more convincingly argue that each complainant has fabricated his or her evidence, thus increasing the likelihood of acquittal.[10] Although this policy concern has its greatest significance in cases involving child sex abuse in the family context, it also bears on sexual offences against children generally.

[10] The modern approach is also designed to avoid situations in which a complainant's credibility is attacked in a separate trial without the benefit of independent corroborating evidence that would support his or her credibility; and to prevent as far as possible the requirement that

**10** A Cossins, Alternative Models for Prosecuting Child Sex Offences in Australia (2010), prepared for the National Child Sexual Assault Reform Committee, 181; cited in *Family Violence – A National Legal Response* (ALRC Report 114).

children give evidence numerous times, including without the protections which would be extended to them as complainants.[11]

[11] While s 341A of the *Criminal Code* clearly establishes a presumption of joint trials in relation to sexual offences charged in the same indictment, and provides expressly that a lack of cross-admissibility or the possibility of collusion will not of themselves be sufficient to rebut the presumption, it does not abrogate the Court's discretion to sever the indictment and order separate trials where there is a real risk of prejudice that cannot be allayed by directions from the trial judge. The dominant consideration remains ensuring that an accused is not deprived by prejudice of a fair trial. The notion of prejudice in this general context "means the danger of improper use of the evidence. It does not mean its legitimate tendency to inculpate".[12] Similarly, the loss by an accused of the strategic advantage of conducting his or her defence in each trial in isolation does not of itself constitute prejudice in the material sense. Something more is required, such as the misuse of evidence on one charge to support a conviction for an unrelated charge for which it would be inadmissible.

[12] For those reasons, the exercise of the discretion will be guided, where relevant, by considering whether the evidence of the two complainants

---

**11** It may be noted in that last respect that the complaints in this case are both now adults.

**12** *HML v The Queen* (2008) 235 CLR 334 at [12] per Gleeson CJ.

is cross-admissible for tendency purposes.[13] One complainant's evidence concerning sexual assault may serve the dual purpose of going directly to prove the charge(s) laid in relation to that complainant, and of having the capacity to support the credibility of the other complainant's account of the charge(s) laid in relation to that other complainant on the basis that the accused had a tendency to commit sexual assaults in particular circumstances. The other complainant's evidence will have the same capacity to operate for that dual purpose.

[13] If the tendency evidence sought to be adduced in this case satisfies the test for admissibility, each complainant's evidence will be cross-admissible in respect of the charges involving the other complainant. That would ameliorate one of the principal risks of prejudice to the accused in the conduct of a joint trial; that is, the misuse of evidence on one charge to support a conviction for an unrelated charge for which it would be inadmissible. In addition, in those circumstances there are specific and well-tried directions to the jury available to ensure that the jury does not misuse evidence on one charge to support a conviction for another charge for which there would otherwise be insufficient evidence.

---

**13** *R v Papamitrou* (2004) 7 VR 375 at [27]. See also *R v TJB* [1998] 4 VR 621 at 630-633; *GBF v The Queen* [2010] VSCA 135 at [55]; *The Queen v JRW* [2014] NTSC 52 at [3]-[6].

[14] For those reasons, it is both necessary and convenient to deal first with the question of the admissibility of the tendency evidence particularised in the Crown's Notice.

**The tendency notice**

[15] The Crown has given Notice dated 30 March 2017 advising its intention to adduce tendency evidence pursuant to s 97(1) of the *Evidence (National Uniform Legislation) Act* (NT) ("ENULA").

[16] The Notice provides that the tendencies sought to be proved are:

(a) a tendency to act in a particular way, namely to initiate and engage in sexual misconduct over a number of years with young males who the accused had befriended and with whom the accused had developed a level of trust and confidence; and

(b) a tendency to have a particular state of mind, namely a sexual interest, upon which the accused was prepared to act, in young males the accused had befriended and with whom he had developed a level of trust and confidence.

[17] The Crown says that evidence from the second complainant in relation to the acts alleged to have been committed against him is cross-admissible for tendency purposes in the proof of each of the counts relating to the first complainant; and that evidence from the first complainant in relation to the acts alleged to have been committed against him is cross-admissible for the same purposes in each of the

counts relating to the second complainant. In other words, the Crown contends that the evidence from each complainant is mutually admissible to prove the tendencies alleged.

[18] Although not express in the terms of the Notice, the Crown does not assert that the evidence of one count concerning a complainant is admissible for tendency purposes in respect of any other count concerning that same complainant. The Crown asserts only that the first complainant's evidence of conduct of a sexual kind against him by the accused is admissible for tendency purposes in the counts concerning the second complainant, and *vice versa*.

[19] The adoption of this position is apparently based on the determination in *IMM* to the effect that evidence from a complainant of conduct of a sexual kind on the part of the accused will generally be relevant for tendency purposes only to the extent that it is capable of supporting the credibility of the complainant's account.[14] In the application of that test, a complainant's unsupported evidence in relation to a separate act of sexual misconduct by an accused against the complainant is unlikely to have the requisite degree of probative value in proving the act in respect of which charge is brought.

[20] It may be noticed in this respect that the relevant discussion in *IMM* is limited to "a complainant's evidence of conduct of a sexual kind from

**14** *IMM v The Queen* (2016) 257 CLR 300 at [62]-[64].

an occasion other than the charged acts". That express limitation notwithstanding, it is difficult to see why the same analysis would not also apply to evidence of conduct of a sexual kind from a charged act. The operative issue remains whether evidence of that kind from a complainant has any capacity to support the credibility of a complainant's account in relation to another act or occasion involving that same complainant.

[21] Subject to that qualification, the Notice tabulates the tendency evidence in the following terms (redacted to remove the names of the complainants).

| **Conduct** | **Date & Time** | **Circumstances** |
|---|---|---|
| ***Counts involving the first complainant*** | | |
| Masturbation<br><br>(COUNT 1) | Between 1 January 1978 and 31 December 1981. When [the first complainant] was aged between 11 – 13 years old. | The accused and [the first complainant] were in the accused's utility driving back from Warrego.<br>The accused grabbed the complainant's hand and placed it on the accused's erect penis and made the complainant masturbate him.<br>The accused stopped on a road leading up to a hill next to the speedway and made the complainant continue masturbating the accused until the accused ejaculated. |
| Masturbation<br><br>(COUNT 2) | Between 1 January 1978 and 31 December 1981. When [the first complainant] was aged between 11 – 13 years old. | The accused and [the first complainant] were in the back of the accused's utility as it was being driven from Booraloola to Mataranka.<br>The accused grabbed the complainant's hand and placed it on his erect penis and made the complainant masturbate him until the accused ejaculated. |

| | | |
|---|---|---|
| Masturbation<br><br>(COUNT 3) | Between 1 January 1978 and 31 December 1981<br><br>When [the first complainant] was aged between 11 – 13 years old. | The accused lay on mattress next to [the first complainant] and took the complainant's hand and made him masturbate the accused until the accused ejaculated. |
| Masturbation, digital - anal penetration; and fellatio<br><br>(COUNTS 4 - 6) | Between 1 January 1978 and 31 December 1981<br><br>When [the first complainant] was aged between 11 – 13 years old. | [The first complainant] was sleeping on a couch at the accused's home.<br>The complainant was woken by the accused who grabbed the complainant's hand and placed it on the accused's groin. The accused was wet as if he had just had a shower and had a towel around him.<br>The accused pulled aside the complainant's underwear and digitally penetrated the complainant's anus and moved his finger in and out of the complainant's anus for about 10 to 15 minutes.<br>While the accused held the complainant's hand on the accused's penis, the accused put the complainant's penis in the accused's mouth and made the complainant perform fellatio upon the accused for a short amount of time. |
| Masturbation<br><br>(COUNT 7) | Between 1 January 1978 and 31 December 1981<br><br>When [the first complainant] was aged between 11 – 13 years old. | The accused and [the first complainant] were in the accused's car driving to do a wedding gig at the Tennant Creek Gun Club.<br>The accused reached over and grabbed the complainant's hand and placed it on the accused's erect penis and made the complainant masturbate him until the accused ejaculated. |
| Masturbation and fellatio<br><br>(COUNTS 8 and 9) | Between 1 January 1978 and 31 December 1981<br><br>When [the first complainant] was aged | [The first complainant] was with the accused at the Tennant Creek High School during the evening while the accused was checking the doors.<br>The accused took the complainant into a darkened room and forced the complainant's hand onto the accused's erect penis and made the complainant masturbate the accused. |

| | | |
|---|---|---|
| | between 11 – 13 years old. | The accused then forced the complainant's head onto the accused's penis and made the complainant perform fellatio upon the accused.<br>The accused later let go of the complainant's head and continued to make the complainant masturbate the accused until the accused ejaculated. |
| Fellatio<br><br>(COUNT 10) | Between 1 January 1978 and 31 December 1981<br><br>When [the first complainant] was aged between 11 – 13 years old. | The accused and [the first complainant] were in the accused's car on a Tennant Creek bush track. The accused stopped the car. The accused then forced the complainant's head onto the accused's erect penis and made the complainant perform fellatio upon the accused. |
| ***Counts involving the second complainant*** | | |
| Touching the complainant's genitals; touching his own genitals in the presence of the complainant; and exposing the complainant to pornography.<br><br>(UNCHARGED) | Between 1 January 1978 and 31 December 1986.<br><br>When [the second complainant] was aged between 7 to 14 years old | The accused touched [the second complainant] on the complainant's genitals; the accused would also touch his own genitals in the presence of the complainant and exposed the complainant to pornography. |
| Fellatio and throwing semen on the complainant's body.<br><br>(COUNTS 11 and 12) | Between 1 January 1983 and 31 December 1987<br><br>[The second complainant] was 13 years old. | [The second complainant] was in shower at Warrego Mine Club. The accused got on his knees, placed the complainant's penis in his mouth and performed fellatio upon the complainant. The accused ejaculated on his hand and then threw his semen at complainant. |
| Penile – anal penetration<br><br>(COUNT 13) | On or about 25 March 1984<br><br>[The second complainant] | The [second] complainant was feeling unwell and was lying on the bed. The accused lay behind the complainant and inserted his penis into the complainant's anus. |

| | | |
|---|---|---|
| | was 13 years old. | |
| Masturbation; rubbing accused's penis on the complainant's penis; and fellatio.<br><br>(COUNTS 14 – 16) | Between 1 January 1985 and 31 December 1987<br><br>[The second complainant] was aged between 14 and 15 years old. | While [the second complainant] was trying to go to sleep the accused touched the complainant on the chest, the accused then took the complainant's penis into his hand and masturbated the complainant. At the same time the accused was masturbating himself. The accused then rubbed his penis on the complainant's penis, lay on top of the complainant and 'dry humped' the complainant until the accused ejaculated. The accused then put his mouth on the complainant's penis and performed fellatio on the complainant. |
| Digital - anal penetration<br><br>(COUNT 17) | On or about 26 November 1990<br><br>[The second complainant] was 19 years old. | The accused and [the second complainant] were celebrating the complainant's 19th birthday. The complainant was drunk. After the accused gave the complainant a birthday gift the accused told the complainant to close eyes and get on all fours. The accused pinned the complainant down and performed penile-anal sexual intercourse upon the complainant against the complainant's will. The complainant passed out. |
| Digital - anal penetration<br><br>(COUNT 18) | Between 1 January 1992 and 31 December 1992<br><br>[The second complainant] was about 20 to 21 years old. | [The second complainant] was lying in the tray of the accused's utility. The accused and the complainant had an argument. The accused said to the complainant 'you are getting fucked, I will teach you a lesson'. The accused gagged the complainant, and pinned his left hand down and took off the complainant's shorts. The accused then got behind the complainant and performed penile-anal sexual intercourse upon the complainant against the complainant's will. |

**Admissibility of the tendency evidence**

[22] Section 97 of the ENULA provides for the admissibility of tendency evidence subject to the requirements of notice and significant probative value. It provides:

**The tendency rule**

(1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless:

(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

(2) Subsection (1)(a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100; or

(b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

*Note for section 97*

*The tendency rule is subject to specific exceptions concerning character of and expert opinion about accused persons (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.*

[23] The general operation of the provision was described in *R v Grant* in the following terms:[15]

> [25] The regime for the admission of tendency evidence under the ENULA replaces the common law rules in relation to "propensity" or "similar fact" evidence. The common law rules in relation to this type of evidence no longer govern (but may inform) the assessment of the probative value and admissibility of tendency evidence under the ENULA. A number of matters warrant some preliminary comment in this context.
>
> [26] First, the common law generally required a "striking similarity" or "underlying unity" between the similar facts in order for them to qualify as admissible [see, for example, *Pfennig v The Queen* (1995) 182 CLR 461 at

**15** *R v Grant* [2016] NTSC 54 at [25]-[28]; and subsequently endorsed in *BD v The Queen* [2017] NTCCA 2.

485; *HML v The Queen* (2008) 235 CLR 334]. The ENULA creates its own regime for the admission of tendency evidence. The existence of "similarity" is not a necessary requirement for tendency evidence. That said, the consideration of similarity remains a guide in determining in some circumstances whether tendency evidence has sufficient probative value to pass the test for admissibility under the statutory regime [*R v Fletcher* (2005) 156 A Crim R 308, [60]. See also *AE v The Queen* [2008] NSWCCA 52; *R v Milton* [2004] NSWCCA 195; *R v Harker* [2004] NSWCCA 427; *R v F* (2002) 129 A Crim R 126; *R v WRC* (2002) 130 A Crim R 89]. It may also be noted that the requirement for striking similarity or underlying unity remains important to the question of admissibility in cases where the identity of the offender is in issue, but is less significant in cases where the accused is known to the complainant and no issue of identity arises.

[27] Secondly, propensity and similar fact evidence is excluded under the common law where there is "a rational view of the evidence that is inconsistent with the guilt of the accused" [*Hoch v The Queen* (1988) 165 CLR 292 at 296]. In making that determination the trial judge was required to apply the same test as a jury. Where there was a rational view of the evidence consistent with the accused's innocence, the probative force of the evidence was considered to be automatically outweighed by its prejudicial effect. The ENULA introduces a legislative formulation for balancing probative value against prejudicial effect which displaces the "no rational view" test [*R v Ellis* (2003) 58 NSWLR 700 at [89]. Under that formulation, the probative value is to be assessed by the trial judge on the assumption that the jury will accept the evidence, thus precluding any consideration of whether the evidence is credible or reliable for that purpose [*IMM v The Queen* (2016) 90 ALJR 529 at [42], [43], [49]-[50] and [52] per French CJ, Kiefel, Bell and Keane JJ. It should be noted in this context that proceeding on the assumption the jury will accept the evidence does not preclude the trial judge from determining that the circumstances surrounding the evidence render it too weak to have any probative force.].

[28] Thirdly, under the common law it was necessary to exclude the possibility of contamination, collusion, concoction or other influence before propensity and similar fact evidence is admitted. Under the ENULA the possibility of concoction will not automatically or necessarily deprive propensity evidence of the requisite level of probative value to qualify it for admission [*IMM v The Queen* (2016) 90 ALJR 529 at [59] per French CJ, Kiefel, Bell and Keane JJ]. That notion notwithstanding, there may be objective facts and circumstances surrounding a particular piece of propensity evidence which renders it too weak or unconvincing to have any real probative force.

[24] Against that background, it falls to consider the nature of the tendency evidence sought to be admitted in this case; the probative value of that evidence; and whether its admission would give rise to any prejudice which would outweigh the probative value of the evidence.

[25] The Dictionary in the ENULA defines "probative value" of evidence to mean "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue". The test of "significant probative value" in the tendency rule is higher than that required to establish relevance under s 55 of the ENULA.[16] The use of "significant" as a qualifier in this context connotes something more than mere relevance, but something less than a substantial degree of relevance.[17] This resolves to a judicial evaluation of whether the hypothetical jury would rationally think it likely that the evidence is important in relation to the determination of the fact(s) in issue.[18]

[26] The evidence which the Crown seeks to adduce is, in essence, evidence of sexual misconduct by the accused against each complainant when they were juveniles (with the exception of counts 17 and 18, which are alleged to have taken place when the second complainant was an adult and which are discussed further below). The Crown contends that the

---

**16** See *BD v The Queen* [2017] NTCCA 2 at [84]; *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 180 ALR 569 at [72]–[73].

**17** S Odgers, *Uniform Evidence Law*, Thompson Law Book Co, Looseleaf Service, [EA.97.120]; *R v Lockyer* (1996) 89 A Crim R 457; *R v Lock* (1997) 91 A Crim R 356 at 361; *R v AH* (1997) 42 NSWLR 702.

**18** Odgers, op cit, [EA.97.120]; *R v Zhang* (2005) 158 A Crim R 504 at [46]; *R v Ford* (2009) 201 A Crim R 451 at [52]; *DSJ v Director of Public Prosecutions (Cth)* (2012) 215 A Crim R 349 at [67], [71], [72].

evidence of the offending against the first complainant establishes a tendency which could rationally affect the assessment of the various facts in issue in the counts concerning the second complainant, namely whether the accused engaged in the conduct alleged to constitute the offences against the second complainant. The Crown makes the same contentions in relation to the probative value of evidence of the offending against the second complainant in the assessment of the counts concerning the first complainant. The probative value is said to lie in the fact that the evidence clearly establishes a tendency on the part of the accused to groom and engage in sexual misconduct with vulnerable adolescent males in the gratification of his sexual interest, and in that way acts in corroboration of the evidence of each complainant.

[27] The relevant test is whether the features of commonality between the conduct charged and the conduct described in the tendency evidence are significant enough logically to imply that because the accused sexually interfered with one complainant, he is more likely to have touched the other complainant with a sexual motive or purpose.[19] In other words, the question is whether evidence of the offending against one complainant has a capacity to demonstrate that the accused interacted with the other complainant in a manner that constituted

**19** *CEG v The Queen* [2012] VSCA 55 at [14].

sexual misconduct. That capacity, if it does subsist, would support the credibility of the other complainant's account.

[28] There can be no doubt that the evidence of each complainant, if it is accepted, would clearly demonstrate a sexual interest in adolescent males and that the accused was prepared to act on that interest. The evidence in question is of frank sexual misconduct, which bears no explanation other than the gratification of sexual interest. The relevant question then becomes whether the features of commonality concerning the offending against each complainant are significant enough logically to imply that because the accused committed the acts against one complainant, or committed them in particular circumstances, he is likely to have committed acts with a sexual motive or purpose against the other complainant.[20]

[29] The Crown points to a number of factors in aid of the proposition that there is a substantial degree of commonality in the offending against each complainant. In particular, the Crown identifies the following matters:

- the complainants were both young males beset with personal problems;
- the accused took advantage of that vulnerability to forge a relationship of trust and confidence by involving each complainant

**20** *CEG v The Queen* [2012] VSCA 55 at [14].

in his personal life and work activities, and then to use that trust and confidence in the achievement of the offending conduct; and

- the conduct generally took place in circumstances where the complainant had been invited to accompany the accused in his work activity providing musical and "disco" services in and around Tennant Creek, or in the back of the accused's vehicle or home.

[30] Counsel for the accused contends that there is insufficient commonality to afford the evidence any probative value for tendency purposes. It is contended in that respect that there is, in fact, a striking dissimilarity between the nature of the conduct alleged against each complainant, and significant circumstantial differences concerning the character of the offending against each complainant.

[31] As is apparent from the tabulation extracted above, the nature of the offending against the first complainant may be broadly and crudely summarised as constituting six occasions on which the accused forced the complainant to masturbate him; two occasions on which the accused forced the complainant to perform fellatio on him; one occasion on which the accused performed fellatio on the complainant; and one occasion involving digital penetration. Ranged against that, the nature of the alleged offending against the second complainant may be summarised as constituting three occasions of penile-anal intercourse; two occasions on which the accused performed fellatio on

the complainant; one occasion involving the accused ejaculating and throwing semen on the complainant; one occasion on which the accused masturbated the complainant; one occasion involving activity described as "dry humping"; and a number of uncharged acts alleging that the accused touched the complainant's penis when he was substantially younger under the guise of playing games.

[32] So far as the circumstantial differences are concerned, counsel for the accused draws attention to the fact that the second complainant provides an account in which the accused extended monetary inducements or engaged in threatening behaviour in the context of the offending conduct. There is no mention of such behaviour in the various statements provided by the first complainant.

[33] Those differences are not enough in themselves to deprive the evidence of significant probative value for tendency purposes. It is not necessary that the incidents must show a pattern of behaviour on the part of the accused which involves one specific type of conduct, or the same specific conduct in respect of each complainant. As the Court of Criminal Appeal observed in *BD v The Queen*:[21]

> To take another example, it is clear that "evidence that showed that [an accused] had a sexual interest in, and attraction to, adolescent boys [would have] probative value in respect of an allegation that he had sexually abused another adolescent boy" [*Dao v R* (2011) 278 ALR 765 at [187]]. In the application of that principle, evidence of grooming behaviours in the nature of minor sexual touching and fondling of one adolescent may have

**21** [2017] NTCCA 2 at [94].

> significant probative value as tendency evidence informing the question whether an accused engaged in a sexual act with another adolescent, even where there is a lack of similarity between the sexual acts with the different adolescents [*R v PWD* (2010) 205 A Crim R 75 at [86]-[88]]. The grooming behaviours in question in both *Dao* and *PWD* involved actual sexual misconduct with children, and by that character supported tendency reasoning. As Simpson J observed in *Dao*, "[e]vidence of more serious [sexual] conduct may support allegations of less serious [sexual] conduct just as evidence of less serious [sexual] conduct may support allegations of more serious [sexual] conduct", despite the wide variety in the accused's sexual behaviour [*Dao v R* (2011) 278 ALR 765 at [187] (Spigelman CJ, Allsop P, Kirby and Schmidt JJ agreeing)].

[34] For the reasons identified by the Crown as demonstrating a substantial degree of commonality, there is a degree of similarity between the circumstances in which the conduct against each complainant took place. In addition to that consideration, the alleged offending against each complainant took place when they were of a similar age. The fact that the offending against the first complainant is alleged to have commenced in 1978 and concluded in 1981, whilst the offending against the second complainant is alleged to have commenced in 1983, does not suggest that any asserted transgression on the part of the accused against adolescent boys was an isolated aberration and not reflective of a relevant tendency. The continuing nature of the conduct alleged, and the relative temporal proximity between the conclusion of one set of offending and the commencement of the other, tells against that characterisation.

[35] To the extent that there are any differences between the nature of the offending the accused is alleged to have committed against each

complainant, the Crown suggests those differences may be explained in large part by the fact that the second complainant lived under the same roof as the accused while the first complainant did not.

[36] Having regard to those matters, the evidence identified in the Crown's Notice has significant probative value within the meaning of s 97 of the ENULA for the purposes for which the Crown would seek to adduce it. That conclusion is subject to two qualifications. First, the uncharged acts involving the accused touching the second complainant's testicles and penis are alleged to have commenced when the second complainant was approximately seven years of age. Secondly, the conduct constituting count 17 is alleged to have taken place when the complainant was 19 years of age, and the conduct constituting count 18 is alleged to have taken place when the complainant was approximately 21 years of age.

[37] The relevant tendency asserted by the Crown is a sexual interest in and misconduct concerning adolescent males. The Crown suggests that the relevant attraction and conduct may relate more to the victim's emotional and psychological development than to a bare consideration of chronological age. That attempt at rationalisation notwithstanding, there is insufficient commonality between evidence of those matters and the conduct constituting the counts concerning the first complainant to afford that evidence any probative value for tendency purposes. The Crown contends that if the evidence of the uncharged

acts is not admissible as tendency evidence in the counts concerning the first complainant, it is nevertheless admissible as "context" or "relationship" evidence for the purposes of the counts involving the second complainant. That matter is dealt with further below.

[38] It falls then to consider whether the probative value of the tendency evidence "substantially outweighs" any prejudicial effect within the meaning of s 101 of the ENULA. That section provides, so far as is relevant for these purposes, that tendency evidence cannot be used against a defendant unless its probative value substantially outweighs any prejudicial effect. It is in the following terms:

> **101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution**
>
> (1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.
>
> (2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.
>
> (3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.
>
> (4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.

[39] There will be prejudicial effect in the relevant sense if by admission of the tendency evidence the accused is deprived of a fair trial. Evidence is not unfairly prejudicial merely because it makes it more likely that

the defendant will be convicted. The accused will be deprived of a fair trial if there is a real risk that the evidence will be misused by the jury in some unfair way.[22] A mere possibility is not enough; there must be a real risk of unfair prejudice by reason of the admission of the evidence.[23] In addition, the risk of prejudice must be referable to the use of the material for tendency purposes. While there is some overlap between the assessment of that risk and the risk of prejudice for determining whether to order severance, different considerations may arise. The question of severance is dealt with further below.

[40] The risk of unfair or improper use of the evidence for tendency purposes in this matter is that the jury may reason that because the accused conducted himself in a certain matter with one complainant he must necessarily have conducted himself in the same manner with the other complainant. Putting it another way, the danger of unfair prejudice is the risk that knowing of the alleged criminal conduct of the accused concerning one complainant, the jury might be diverted from a proper consideration of the evidence concerning the other complainant and simply assume the accused's guilt.[24]

---

**22** *R v BD* (1997) 94 A Crim R 131 at 139; *Papakosmas v The Queen* (1999) 196 CLR 297 at [91]–[92]; *Ainsworth v Burden* [2005] NSWCA 174 at [99]; *Gonzales v R* (2007) 178 A Crim R 232 at [70]; *R v Ford* (2009) 201 A Crim R 451 at [56]; *Doklu v R* (2010) 208 A Crim R 333 at [45].

**23** *R v Lisoff* [1999] NSWCCA 364 at [60].

**24** *R v Suteski* (2002) 56 NSWLR 182 at [116]); *R v AH* (1997) 42 NSWLR 702 at 709; *R v Watkins* (2005) 153 A Crim R 434 at [49]-[50].

[41] That is not to say that any propensity reasoning is prejudicial and unfair. As the New South Wales Court of Criminal Appeal observed in *BC v R*[25], in some cases it is not improper, and thus not prejudicial, for a jury to reason that if the accused is a person who has demonstrated the asserted tendency then he is more likely to have acted in the manner alleged, and thus more likely to have committed the alleged offence. Beech-Jones J observed relevantly:[26]

> To the contrary, that is the very reasoning that the tendency evidence supports and is the very basis upon which it is admitted.

[42] The risk that the jury may be emotionally affected or may use the evidence improperly can be accommodated by suitable directions.[27] As Gleeson CJ and Gummow J observed in *Gilbert*:[28]

> The system of criminal justice, as administered by appellate courts, requires the assumption that, as a general rule, juries understand, and follow, the directions they are given by trial judges. It does not involve the assumption that their decision-making is unaffected by matters of possible prejudice.

[43] The relevant directions in relation to tendency evidence would include the caution that the evidence cannot be used to conclude simply that the accused is the sort of person who is more likely to commit this kind of offence; that the tendency evidence may only be taken into account

---

**25** [2015] NSWCCA 327.

**26** *BC v R* [2015] NSWCCA 327 at [81].

**27** See, for example, *Gilbert v The Queen* (2000) 201 CLR 414 at 425; *Reza v Summerhill Orchards Ltd* (2013) 37 VR 204 at [50]; *R v Mokbel* (2009) 26 VR 618 at [90]; *Dupas v The Queen* (2010) 241 CLR 237 at [22], [26], [29], [38].

**28** *Gilbert v The Queen* (2000) 201 CLR 414 at 420.

if the Crown proves to the requisite standard that the acts said to demonstrate the tendency actually took place;[29] and that the tendency evidence may only be taken into account if the Crown has also proved that it may be inferred or concluded from those acts that the accused did in fact have the tendency asserted by the Crown. It is only if those matters are satisfied that the jury may use the tendency evidence in assessing whether the charge(s) contained in the indictment have been proved beyond reasonable doubt.

[44] Ranged against that, the probative force of the tendency evidence in the Crown case would be to provide, in the context of sexual offences of the same or similar character, corroborating evidence from each complainant to address the inevitable defence contention that the other complainant has fabricated that evidence. That corroboration, if accepted by the jury, would reveal a pattern of conduct that might suggest as a matter of common sense and experience the objective improbability of fabrication. It may be noted in this respect that there

---

**29** There is an unresolved issue concerning the content of the direction in this respect and, ultimately, the utility of tendency evidence in these circumstances. Until it is authoritatively decided otherwise, the standard of proof for tendency evidence in child sexual assault cases is proof beyond reasonable doubt: see *DJV v R* (2008) 200 A Crim R 206 at [30]; *Doyle v R* [2014] NSWCCA 4 at [129]; *Campbell v R* [2014] NSWCCA 175 at [259], [325]–[333]. Where the evidence in question concerns the commission of charged acts involving a first complainant said to demonstrate a tendency relevant to the proof of charged acts concerning a second complainant, it may not be used for that purpose unless the prosecution has proved the act(s) involving the first complainant beyond reasonable doubt. In so doing, it would not be open to the jury to use charged acts concerning the second complainant for tendency purposes unless they have also first been proved beyond reasonable doubt. On that analysis, the charged acts in respect of one complainant would need to be proved beyond reasonable doubt – without recourse for tendency purposes to any alleged dealing concerning the other complainant – before those acts could be deployed as tendency evidence; and *vice versa*. If that analysis is correct, it would arguably render the evidence inutile for tendency purposes in any practical sense.

is no suggestion that the complainants know each other or that there has been any opportunity for concoction or collusion in this case.

[45] For these reasons, the proper conclusion is that the probative value of the evidence substantially outweighs its prejudicial effect. For the reasons already given, that conclusion is subject to the exclusion of the evidence concerning the uncharged acts and the conduct constituting counts 17 and 18.

**Context or relationship evidence**

[46] As already described, the Crown contends in addition that evidence of the uncharged acts is properly admissible as context or relationship evidence in the charges concerning the second complainant. It is also the case that evidence in relation to counts 11 to 16 may operate as context or relationship evidence in relation to the conduct constituting counts 17 and 18.

[47] A distinction may be drawn between evidence which is admitted under the tendency rule on the one hand, and context or relationship evidence on the other hand. The operation of s 95 of the ENULA is that evidence cannot be used to prove that the accused had a relevant tendency unless that evidence is admissible under the tendency rule in s 97. Subject to that qualification, the evidence in question may also be admitted for a non-tendency purpose. The admissibility of evidence for those purposes is governed by the general test of relevance in s 55

of the ENULA, and the discretions and obligations contained in Part 3.11 of the ENULA (particularly ss 135 and 137).[30]

[48] One example of a non-tendency purpose commonly arising in sexual offence cases is context or relationship evidence that is not relied on for a tendency inference. In *HML v The Queen* various members of the High Court observed that evidence of other conduct by an accused may, depending upon the circumstances, be admissible for non-tendency purposes, including:[31]

(a) as essential background against which the evidence of the complainant and the accused necessarily falls to be evaluated, to show the continuing nature of the conduct, and to explain the offences charged;

(b) to overcome a false impression that the event was an isolated one, or that the offence happened "out of the blue", where the acts are closely and inextricably mixed up with the history of the offence;

(c) to assess the credibility of a complainant's evidence; and

(d) to ensure that the jury is not required to decide issues in a vacuum, and to negative issues concerning lawfulness (such as the question of consent in relation to counts 17 and 18).

---

**30** *R v Quach* (2002) 137 A Crim R 345 ; *Conway v R* (2000) 172 ALR 185; *FDP v R* [2008] NSWCCA 317; *R v Cornwell* (2003) 57 NSWLR 82; *R v Lock* (1997) 91 A Crim R 356.

**31** *HML v The Queen* (2008) 235 CLR 334 at [6]-[7] per Gleeson CJ.

[49] In order for context or relationship evidence to be relevant it must be shown that the evidence would make the complainant's version of the particular incident subject to the charge more capable of belief when seen in the context of that relationship. The relationship evidence in this case, if accepted, is manifestly relevant in the assessment of the counts involving the second complainant. The evidence of the uncharged acts demonstrates the manner in which the accused "groomed" the second complainant as a precursor to the subsequent sexual misconduct. In that sense it informs the assessment of the credibility and coherence of the second complainant's evidence, and provides essential background to explaining the offences charged. Similarly, the evidence in relation to counts 11 to 16 provides essential background to the allegations of unlawful carnal knowledge when the second complainant was an adult, and provides a history against which the jury may assess whether that conduct was unlawful.

[50] The probative value of this evidence as context relationship evidence is neither outweighed by the danger of unfair prejudice to the accused, nor substantially outweighed by the danger that the evidence might be unfairly prejudicial to the accused. In particular, the evidence has a high degree of probative value in the assessment of the credibility of the second complainant's evidence.

**Severance**

[51] Against that background and those findings concerning admissibility, the defence makes application for severance in the following terms:

(a) that counts 1 to 10 concerning the first complainant be severed and tried separately from the accounts concerning the second complainant; and

(b) that counts 11 to 16 concerning the second complainant be severed and tried separately from counts 17 and 18 concerning the second complainant.

[52] That application is made on two bases. The first basis is that the counts were never properly joined on the one indictment in the first place. The second basis is that even if the counts were properly joined in the first instance, a joint trial would give rise to substantial and incurable prejudice to the accused.

[53] As already described, s 309 of the *Criminal Code* provides relevantly that charges for more than one offence may be joined in the same indictment if they form part of "a series of offences of the same or a similar character". That requires some nexus or similarity between the offences which in all the circumstances of the case enables them to be described as a "series".[32] The counts in respect of each complainant clearly have some nexus or similarity given that each offence is

**32** *R v PJMS* [2011] NTSC 48 at [10].

allegedly committed against the same victim and as part of what might generally to be described as a course of conduct. Counsel for the accused does not suggest otherwise.

[54] That leaves the question whether the counts in respect of both complainants may properly be described as a series of offences of the same or similar character. In the particular circumstances of this case, it may also be concluded that the offences against both complainants may be described as a series of similar character. That conclusion follows from largely the same considerations canvassed above for the purpose of determining whether there was sufficient commonality between those charges for tendency purposes. The offences described in counts 17 and 18 may be included in that description. Although they may not possess sufficient commonality for tendency purposes, they do form part of a series of incidents involving the accused's dealings with the second complainant. That the conduct of the subject of count 17 and 18 took place when the second complainant was an adult does not deprive them of the requisite similarity for the purposes of s 309 of the *Criminal Code*.

[55] It follows that the joinder of all counts on the one indictment was permissible. That leaves the question whether the joint trial of those counts would give rise to prejudice in the relevant sense.

[56] As has already been observed, even prior to the introduction of the statutory presumption for joint trials in relation to sexual offences, mutual admissibility on the basis of "similar fact" evidence militated against an order for separate trials because the same evidence would be admissible in each trial in any event. Cross-admissibility removes the potential prejudice inherent in the use of evidence on one charge to support a conviction for an unrelated charge for which it would be inadmissible. For that reason, the exercise of the discretion to sever counts will be guided, where relevant, by considering whether the evidence is cross-admissible between counts (or, as in this case, between complainants).[33] The same consideration has operation in relation to mutual admissibility for tendency purposes, subject to the court's discretion to sever the indictment and order separate trials where there is a real risk of some other form of prejudice that cannot be allayed by directions from the trial judge.

[57] Leaving aside the possibility of the jury engaging in rank propensity reasoning (which has already been dealt within the context of the tendency evidence), counsel for the accused points to two species of prejudice which are said to arise in these circumstances. Each may be dealt with briefly.

---

**33** *R v Papamitrou* (2004) 7 VR 375 at [27]. See also *R v TJB* [1998] 4 VR 621 at 630-633; *GBF v The Queen* [2010] VSCA 135 at [55]; *The Queen v JRW* [2014] NTSC 52 at [3]-[6].

[58] The first type of potential prejudice would take the form of the jury misusing the evidence to attribute undeserved credibility to the evidence of one complainant on the basis of a positive assessment of the credibility of the other complainant, rather than on the basis of a genuine assessment of the first complainant's credibility. That is a potential which may be addressed by an orthodox direction to the jury in that respect.

[59] The second type of potential prejudice is said to derive from the fact that the offences alleged in this case are of an unnatural character such that they will arouse strong emotions or excite revulsion and repulsion in the jury. There are two responses to that.

[60] All 18 offences charged may be characterised in that way. For that reason, each of the offences individually might be considered apt to arouse those reactions. That potential for reaction is compounded by the fact that there are 10 counts alleged in relation to the first complainant, and eight counts alleged in relation to the second complainant. There is no suggestion by counsel for the accused that each of the counts concerning the first complainant must properly be tried separately. Nor is there any such suggestion made in relation to the counts concerning the second complainant. This is presumably on the basis that any such tendency on the part of the jury may be addressed by direction. Once that is accepted, there is no logic in the contention, on the basis of the jury's potential reaction to the nature of

the alleged offending, that the counts concerning the first complainant should be tried jointly as between themselves, but separately to the counts concerning the second complainant.

[61] It may also be noted in this respect that the same considerations which arose in *R v Johnston*[34] do not present here. In that matter, counts 1 to 7 on the indictment related to offences allegedly committed when the complainant was under the age of 16, and counts 8 and 9 related to offences allegedly committed after that time. It was the accused's defence to counts 1 to 7 that the conduct charged it not occur. It was the accused's defence to counts 8 and 9 that the sexual intercourse was consensual. The complainant was the accused's niece.

[62] Severance was ordered on the basis that the accused's evidence of consensual sexual intercourse would prejudice the accused's defence of counts 1 to 7. The trial judge considered that members of the jury might be repelled by the accused's admission to having consensual sexual intercourse with a far younger blood relative, and there was a high risk the evidence would be misused. In the present case, there is no admission to police of consensual sexual intercourse and the accused's defence does not presently involve an admission in those terms.

---

**34** [2016] NTSC 57.

[63] Conversely, in *Johnston* the court held that evidence about the sexual offences said to have been committed by the accused when the complainant was a child did not give rise to prejudice in such a manner as to require severance of the indictment on that basis. The court observed further that the evidence concerning counts 1 to 7 was cross-admissible in relation to counts 8 and 9 in that it would serve to rebut the accused's assertion of consensual sexual intercourse after the complainant had turned 16. So much may also be said of the present case.

[64] The second response to the suggestion of prejudice on the basis of the unnatural character of the offences is that the same considerations necessarily apply in relation to any charges involving child sexual abuse. On the modern approach, that is not a proper basis in and of itself to order the separate trial of charges involving different complainants.

[65] No different consideration arises simply because the accused is of the same gender as the complainant. As Lord Cross observed in *DPP v Boardman*, as long ago as 1974, any view that homosexual offences form a class apart "sounds nowadays like a voice from another world".[35]

**35** *DPP v Boardman* [1975] AC 421 at 458.

**Rulings**

[66] The rulings on the preliminary issues are:-

(a) The evidence identified in the Crown's tendency notice concerning counts 1 to 10 is admissible for tendency purposes in the determination of counts 11 to 16.

(b) The evidence identified in the Crown's tendency notice concerning counts 11 to 16 is admissible for tendency purposes in the determination of counts 1 to 10.

(c) The evidence identified in the Crown's tendency notice concerning the "uncharged acts" is inadmissible for tendency purposes, but is admissible as context or relationship evidence in the determination of counts 11 to 18.

(d) The evidence identified in the Crown's tendency notice concerning counts 11 to 16 is admissible as context or relationship evidence in the determination of counts 17 and 18.

(e) The application to sever the indictment is dismissed.

---